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No. 488

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE CALLANAN ROAD IMPROVEMENT COMPANY, A CORPORATION, SOUTH BETHLEHEM, NEW YORK, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CORNELL STEAMBOAT COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINION BELOW

The opinion of the District Court for the Northern District of New York (R. 59) is reported in 107 F. Supp. 184. The report of the Interstate Commerce Commission (R. 22) appears in 285 I. C. C. 75.

JURISDICTION

The final decree of the three-judge district court was entered on September 15, 1952 (R. 71).

The petition for appeal was presented and allowed on November 7, 1952 (R. 71, 74). The jurisdiction of this Court is conferred by 28 U. S. C. 1253, 2101 (b), and 2325. Probable jurisdiction was noted on February 2, 1953 (R. 80).

QUESTIONS PRESENTED

In our view, the questions presented are:

1. Whether, in issuing certificates of public convenience and necessity to water carriers pursuant to Part III of the Interstate Commerce Act, the Interstate Commerce Commission may specify the service to be rendered.

2. Whether appellant's certificate authorizes it to perform the service known as towage, or limits it to the service known as freightage.

3. Whether the Commission properly found that the service covered by the tariffs which it ordered cancelled constituted towage.

STATUTE INVOLVED

The relevant provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 45–48.

STATEMENT

This is a direct appeal from the judgment of a three-judge district court dismissing a suit to enjoin enforcement of an order of the Interstate Commerce Commission. The order in question required appellant, a common carrier by water, to cancel certain rates which it had published,

undertaking to grant allowances or deductions from its established rates for the transportation of bricks when the vessel used in such transportation was furnished by the shipper. The Commission found that the service rendered by appellant pursuant to such rates was towing, a service which appellant was not authorized to perform under the terms of its certificate.

Appellant's certificate of public convenience and necessity authorizes it to operate as a common carrier by water "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels" in the transportation of commodities generally on the Hudson River between Waterford, New York, and New York City (R. 56–57). Appellant acquired its certificate by purchase from the estate of Joseph R. Hutton in 1948 (R. 21–22).

Hutton's original certificate, issued on July 17, 1942, in "grandfather" proceedings under Section 309 of the Interstate Commerce Act,[1] authorized him to transport commodities generally as a common carrier on the Hudson River and other waterways in New York State (R. 9–10; *Hutton Contract Carrier Application*, 250 I. C. C. 804). The Commission subsequently reopened the

[1] Section 309 provides that, as to operations conducted by common carriers by water on January 1, 1940, the Commission shall issue a certificate covering such operations "without requiring further proof that public convenience and necessity will be served by such operation * * *"

proceedings on its own motion (R. 11), and on March 7, 1944, cancelled the prior certificate and issued an amended one in its place (R. 14). The amended certificate authorized operations in the same territory as the original one, but stated that Hutton's service was to be performed by "self-propelled vessels" and "non-self-propelled vessels with the use of separate towing vessels" (R. 13). The Commission found that on January 1, 1940—the critical date under the "grandfather" clause—Hutton had been conducting his operations with such equipment, and that

> In the absence of any limits in the certificate with respect to the type of vessels to be used in the performance of the transportation authorized, applicant would be free to extend its operations and perform services different from those performed by him on and since the statutory date [R. 12].

Hutton accepted the amended certificate without objection (R. 62).

Following Hutton's death, appellant applied for and received Commission approval of the purchase of that portion of Hutton's amended certificate which authorized operation on the Hudson River (R. 21–22). In approving the transfer, the Commission authorized appellant to perform "the water-carrier service heretofore authorized" under Hutton's amended certificate of March 7,

1944 (R. 22), and found that the transfer of the certificate, insofar as it permitted such operations, was "consistent with the public interest" (R. 21). Appellant was issued a new certificate on February 5, 1948 (R. 27, 56).

Cornell Steamboat Company ("Cornell") is a common carrier by water certificated to perform towage on the Hudson River (R. 23).[2] On May 11, 1949, Cornell complained to the Commission that appellant's tariff I. C. C. No. 2, which became effective on April 17, 1949, embodied rates which contemplated the service of *towage,* and that the performance of such service violated appellant's certificate which authorized only the service commonly referred to as *freightage* (R. 28). By letter dated September 19, 1950, the Commission's Bureau of Water Carriers and Freight Forwarders informed appellant that, in view of the Commission's decision in ***Dixie Carriers, Inc., Rates and Allowances,*** 278 I. C. C. 417 (1950), it appeared that the service contemplated under the tariff would constitute towage, and that inasmuch as appellant was not authorized to engage in such service, the performance thereof would be unlawful (R. 28). On September 25, 1950, appellant replied that it intended to conduct its operations in conformity with the Commission's determination in the *Dixie* case when the order

[2] See *Cornell Steamboat Co. v. United States,* 321 U. S. 634.

therein became effective (R. 28).[3] The order in the *Dixie* case became effective on December 26, 1950.

On January 5, 1951, appellant filed a petition with the Commission, requesting formal determination whether the operations conducted by appellant pursuant to its aforesaid tariff constituted *freightage*, a service which it was authorized to perform, or *towage*, a service not in terms authorized by its certificate (R. 23).[4] A full adminis-

[3] In the *Dixie* case, operations substantially similar to those contemplated by appellant's tariff were held to exceed the authority conferred by a similar certificate.

[4] In its petition appellant asked for an opportunity to show that its operations were distinguishable from those in the *Dixie* case (R. 29). Moreover, during the hearing appellant's counsel conceded that the certificate acquired by appellant granted no towing rights. Thus, the following colloquy took place between the examiner, Mr. Curry (counsel for Cornell) and Mr. Wilson (counsel for appellant):

"Mr. CURRY. It is my understanding that it is admitted by the petitioner that the amended certificate which it has received under this transfer under this transfer authority does not include the right to perform towage.

"Mr. WILSON. That is true, Mr. Curry. It includes the right to operate as a common carrier in the transportation of general commodities, with the use of non-self-propelled vessels and separate towing vessels.

"Mr. CURRY. That is my understanding. Thank you.

"Exam. KONIGSBERG. And it is your position that that type of service performed is not towage but freightage?

"Mr. WILSON. That is right, and that the allowances published in the tariff are fully authorized and just and reasonable under Section 314, and so forth" (Tr., Ex. 7, pp. 9–10).

In addition to its petition for an interpretation of its authority, appellant filed with the Commission (1) an appli-

trative proceeding was then conducted by the Commission. This included a hearing in which all interested parties participated, the preparation of a proposed report and order by the examiner, and the filing of exceptions and replies thereto (R. 23).

On October 18, 1951, the Commission issued its report and order finding that appellant had been and was performing the service of towage without appropriate authority (R. 22–32). The Commission pointed out that carriers whose certificates do not "specifically authorize" them to perform towage cannot do so (R. 32). It carefully reviewed the facts relating to appellant's operations (R. 27–32), and concluded that the particular services performed "in connection with the movement of freight in shipper's scows constitutes a towage service" which appellant's certificate did not authorize it to perform (R. 32).

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cation for temporary authority, pursuant to Section 311 (a) of the Act, to perform general towage between points along the Hudson River; (2) an application under Section 5 of the Act to purchase the Hudson River towage rights of L. B. Shaw, Inc.; and (3) an application under Section 309 (e) of the Act for a certificate of public convenience and necessity authorizing it to engage as a common carrier in the performance of general towage on the Hudson River. By order dated January 31, 1951, the Commission denied appellant's application for temporary authority on the ground that appellant had failed to satisfy the requirements for the issuance of such authority. The remaining applications were pending before the Commission at the date of the issuance of the order under review (R. 29). They have since been denied (R. 64).

The Commission accordingly ordered appellant to cancel the rates, charges, and allowances involved (R. 33). A petition for reconsideration was denied by the Commission on March 17, 1952 (R. 34).

Appellant then filed the instant action in the court below to enjoin enforcement of the Commission's order (R. 1). On September 15, 1952, the court unanimously affirmed the Commission's order and dismissed appellant's complaint (R. 59–71). The court (per Clark, J.) held that the distinction between freighting and towing drawn by the Commission in issuing certificates was a "just and reasonable classification of groups of [water] carriers" under Section 304 (c) of the Act (R. 65–70); that the Commission could correct by amendment the "obvious legal ambiguity" of the original Hutton certificate which, "although in form general, was nevertheless expressly based on a finding of more limited grandfather rights" (R. 65); that since neither Hutton, at the time of the amendment of the original certificate, nor appellant, at the time of the transfer, had raised any objection to the amendment, they must be deemed to have acquiesced therein (*ibid.*); that appellant's present attempt to expand its grant was "an obvious afterthought simulated [*sic*] by the exigencies of its competition with Cornell" (*ibid.*); and that, so far as the operations covered by the disputed rates are concerned, the evidence demonstrated

that appellant received shippers' scows "as part of a consignment to be towed" and did not use them as part of its own equipment; and that consequently these operations constituted towage and not freightage (R. 64).

SUMMARY OF ARGUMENT

I

The Interstate Commerce Act, Part III, authorizes the Commission to specify the type of service which a certificated carrier may perform. Section 309 (d) not only permits the specification of routes and ports to be served, but provides additionally that the Commission may attach "such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part * * *." Congress recognized the historical differences between various types of water service and clearly intended, when it adopted the "grandfather" provisions of Section 309, that there would be a "substantial parity between future operations and prior bona fide operations". *Alton R. Co.* v. *United States,* 315 U. S. 15, 22; *Barrett Line Inc.* v. *United States,* 326 U. S. 179, 193, 200. The powers conferred by Section 309 must also be read in conjunction with Section 304 (c), which authorizes the Commission to establish "just and reasonable classifications of groups of carriers * * * as the special nature of the services performed * * * shall require".

The Commission's settled practice, from the inception of the Act, has been to specify the kind of service to be performed. This practice, while not directly passed upon by the courts, has been implicitly recognized and approved. The dictum in *United States* v. *Seatrain Lines,* 329 U. S. 424, 431, upon which appellant relies, does not deny the Commission's power to limit the type of service, but merely states that the matter is not free from doubt. This statement must be viewed against the factual background of the particular case. The facts of the instant case, as indicated in Point II A, are sharply distinguishable.

If the Commission's practice were overturned, serious practical difficulties would ensue. Thus, it would become difficult, if not impossible, to strike a balance between the public need for water transportation of a particular type and the avoidance of unnecessary and destructive competition in other areas of the industry. The administrative practice, which has aimed at achievement of this balance, has been frankly reported to Congress and has had its continued acquiescence.

II

A. The Commission's amendment, in 1944, of Hutton's original 1942 certificate did not prevent the conduct of any operations which Hutton had been theretofore conducting. It was for the sole purpose of making the certificate conform to the operations which had been performed during

the "grandfather" period. The removal of an ambiguity in a certificate is within the compass of the powers conferred by Section 309 (d).

In any event, Hutton consented to the 1944 amendment and took none of the steps prerequisite to judicial review of the Commission's action. When appellant applied for transfer of Hutton's authority, in 1947, it sought no more than the authority conferred by the then outstanding amended certificate. It did not suggest until 1951 that the 1944 amendment was improper. Appellant stands in no better position than its predecessor in interest, *Gregg Cartage & Storage Co.* v. *United States*, 316 U. S. 74, and may not be heard to attack, either directly or collaterally, the certificate which conferred upon it the exact authority which it sought and pursuant to which it has been operating over a period of years.

B. Freightage involves the provision of the complete transportation service; towage consists of supplying the motive power by which vessels are towed. The Commission has recognized this distinction in service, and has consistently used the words which appear in appellant's certificate—"the transportation of commodities generally by non-self-propelled vessels with the use of separate towing vessels"—as words of art connoting authority to perform freightage. Where the carrier's "grandfather" operations covered both freightage and towage, the certificate has also included the words "by towing vessels in the per-

formance of general towage." This consistent construction of its certificates by the Commission is entitled to substantial weight. *United Truck Lines* v. *Interstate Commerce Commission,* 189 F. 2d 816, 817 (C. A. 9), certiorari denied, 342 U. S. 830; *cf. United States* v. *American Trucking Associations,* 310 U. S. 534, 549. The Commission intended to and did limit appellant's predecessor to a freightage service when it used these words of art in the amended certificate.

III

A carrier engaged in freightage may use shippers' scows, provided they are used as part of its own equipment. But if the scows are received as part of the consignment to be towed, then the carrier is engaged in towage. The record fully supports the Commission's finding that appellant received shippers' scows as part of the consignment to be towed, and that appellant consequently performed towage service in connection with the movement of such scows. The tariffs contemplating the performance of such operations were properly cancelled.

ARGUMENT

I

THE COMMISSION HAS AUTHORITY TO SPECIFY THE TYPE OF SERVICE WHICH A WATER CARRIER MAY PERFORM

Pursuant to Commission approval, appellant purchased a certificate which authorized a par-

ticular type of operation. However, it now questions (Br. pp. 32–40) the basic statutory authority of the Commission to specify the service to be rendered or the type of equipment to be used by a water carrier.[5] It points out, in this connection, that, unlike Section 208 (a) of the motor carrier provisions of the Act, Section 309 (d) fails to provide that the Commission shall specify in a certificate issued by it the service to be rendered. We submit, however, that Section 309, read as a whole, and read together with other provisions of Part III, compels a conclusion contrary to that urged by appellant.

Section 309 (d) in terms requires only that the certificate specify the routes and ports to be served by the authorized carrier. But it is certainly not inferable that the Commission may do no more, for the Section goes on to declare that the Commission may attach "such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those

[5] We would call particular attention to the fact that the words of limitation found in appellant's certificate were in Hutton's certificate when appellant sought a transfer of Hutton's authority, and that appellant made no effort to have the words altered or eliminated. See Point II A, *infra*. While it would accordingly seem doubtful that appellant has standing to challenge the Commission's inclusion of such words of limitation, we nonetheless state our reasons for believing that the Commission is authorized to specify the kind of service which a water carrier may perform.

established by the Commission pursuant thereto." This is followed by a proviso declaring that no term or condition "shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require * * *." This proviso plainly means that the Commission shall not place a quantitative limit or ceiling on the amount of authorized equipment or the amount of authorized service which the carrier may provide. See *American Trucking Associations* v. *United States*, 344 U. S. 298, 316. It fairly implies that the Commission may define the scope of the certificate, including the character of service to be provided thereunder.[6]

This view is confirmed by consideration of the policies reflected in Section 309 (a), which contains the so-called "grandfather" provisions. As is evident from a reading of that section, the

[6] The legislative history of Section 309 (d) sheds little light on the question of the Commission's power to specify the character of service. The Committee report states simply that the proposed certificate provisions "are similar to sections 206, 207, and 208 of the Motor Carrier Act." S. Rep. 433, 76th Cong., 1st Sess., p. 27. The use of the words "trade or trades," in addition to the words "route or routes," in earlier versions of proposed Section 309, appears to be without significance since both sets of terms have a physical or geographical connotation in the water transportation field. As stated by Senator Wheeler, sponsor of the legislation, these words were designed "to cover irregular route operations * * *" [79 Cong. Rec. 10741].

Congressional purpose was to provide that carriers which had been furnishing a service prior to January 1, 1940, and continuously thereafter, might obtain a certificate without a showing of public convenience and necessity. When Congress adopted this provision, it was certainly well aware that historically water carriers have performed various distinct types of operations. See *Sacramento Navigation Co.* v. *Salz*, 273 U. S. 326, 328; *Stevens* v. *The White City*, 285 U. S. 195, 200.[7] Clearly, it was not intended that a carrier which had performed a particular service during the "grandfather" period was to be enabled, notwithstanding the lack of a showing of public convenience and necessity, to undertake operations of a character other than those performed during the critical period. The policy is precisely the same as that reflected in the comparable "grandfather" provisions incorporated in Part II. As this Court stated in *Alton R. Co.* v. *United States*, 315 U. S. 15, 22, a motor carrier case, the "grandfather" clause contemplates "substantial parity between future operations and prior bona fide operations." See *Barrett Line Inc.* v. *United States*, 326 U. S. 179, 193, 200, a water carrier case stating that the same policy is applicable in

[7] The nature and history of the long-established distinction between towage and freighting operations is discussed under Point II B, *infra*, pp. 35–41. Note, also, that the Act itself refers to various types of water carrier service, including floatage, car ferry, lighterage, and towage. Section 303 (f). See, also, note 9, *infra*.

cases arising under Part III. If that policy were ignored by the Commission and "grandfather" carriers permitted to expand the character of their operations, the Commission would be disabled in the performance of its duty, under the certification provisions of the Act, to avoid unnecessary duplication of facilities and services and to minimize destructive competition. See *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 241; cf. *Crescent Express Lines* v. *United States*, 320 U. S. 401, 409.

From the outset, the Commission, in administering the "grandfather" provisions of Part III, has taken the position that an applicant must be restricted to the kind of service previously performed. Thus, in the early case of *A. L. Mechling Barge Line Common Carrier Application*, 250 I. C. C. 77, 78 (1941), it was started:

> Applicant furnishes transportation by barge, and we will limit his service to that type of operation. Classification of carriers in terms of their type of operation assures the public that the same type of service will be continued by them. In this manner the competitive balance of types of carriers over the same route will not be disrupted by changes which they might make without first securing from this Commission the necessary certificates of public convenience and necessity. We will, therefore, as a general policy employ such a classification in defining the operating rights

of water carriers subject to part III of the act.

* * * * *

We find that applicant was in bona fide operation on January 1, 1940, as a common carrier by non-self-propelled carrying vessels * * *[8]

The district court observed in the instant case (R. 69–70):

> We agree with the Commission that it cannot carry out the purpose and intent of Part III if such indefinite expansion as contemplated by the plaintiff is allowable against the Commission's finding of a public interest to the contrary. Specifically there will be set at naught the intent of the grandfather clause, as defined by the Court in the provisions as to motor-carriers. *Crescent Express Lines* v. *United States*, 320 U. S. 401; *Noble* v. *United States*, 319 U. S. 88. Even though these cases may not be complete precedents for the reasons stated in the *Seatrain* case, yet they do state the use of the grandfather clause to preserve "the position which the carrier had obtained in the nation's transportation system." *Noble* v. *United States, supra*, 319 U. S. at page 92. Here Cornell and Hutton had operated without friction apparently for generations in their respective spheres on the Hudson; it would be indeed

[8] See, also, discussion, *infra*, pp. 24–26, 35–39. Note, also, that the *Mechling* decision was promptly brought to the attention of Congress (*infra*, pp. 26–29).

> ironical if under cover of an act designed to preserve that parity, plaintiff was enabled to upset it quite completely.

If the Commission's settled practice in limiting a water carrier's authority to the bona fide operations performed during the "grandfather" period were overturned, the terms and conditions of scores of certificates would be nullified.

Likewise significant in determining the Commission's power to specify the character of service which a carrier may perform is Section 304 (c), which states that the Commission may establish

> * * * just and reasonable classifications of groups of carriers included in the terms "common carrier by water," or "contract carrier by water," *as the special nature of the services performed by such carriers shall require;* and such just and reasonable rules, regulations, and requirements consistent with the provisions of this part to be observed by the carriers so classified or grouped, as the Commission, after hearing, finds necessary or desirable in the public interest. [Emphasis added.]

In this section, Congress clearly recognized that common carriers by water perform various distinct types of services.[9] It would be anomalous,

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[9] Commenting on this Section, Senator Wheeler, a sponsor of the legislation, stated (79 Cong. Rec. 10739):

"Paragraph (c) is of great importance. It enables the Commission to classify interstate common carriers and interstate contract carriers by water in special groups and to vary the regulatory requirements as to rates, accounts, re-

indeed, to hold that the Commission is empowered to define the essential differences between various types of water carrier services for purposes of rule-making, but is required to ignore these very same distinctions in conferring authority under the certificate provisions of the Act. As the Commission pointed out in *Norfolk, Baltimore and Carolina Line, Inc., Ext.-James R.*, 265 I. C. C. 247, 254 (1947).[10] Sections 304 (c) and 309 (d) must be read together:

> The Commission's authority to specify the type of vessels to be used is contained in sections 304 (c) and 309 (d) of the act. Section 304 (c) provides that the Commission may establish such just and reasonable classifications of water carriers as the special nature of the service performed by such carriers shall require; and section 309 (d) provides that there shall be attached to the exercise of the privileges granted by a certificate such reasonable terms, conditions, and limitations, as the public convenience and necessity may from time to time require. In the exercise of this au-

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ports, and other matters in accordance with the nature of the services rendered and the public need. Water transportation is a more varied form of transportation than rail and adjustments of the regulation and flexibility in its administration to satisfy special conditions will enable the Commission to avoid imposing unnecessary burdens upon the carriers. It is to the interest of carriers, shippers, and the public that this paragraph be retained."

[10] On the point under discussion, this decision was affirmed by the entire Commission, 265 I. C. C. 313.

thority the Commission uniformly has classified water carriers and limited their operating rights in accordance with the type of vessels to be operated. *Erie & St. Lawrence Corp. Contract Carrier Application*, 250 I. C. C. 767, 780, and the Commission's report on reconsideration therein, 260 I. C. C. 235, 237–238.

If, as we contend, the Commission is authorized to define the character of service to be performed by language of limitation incorporated in the carrier's certificate, then it needs no argument that it may do so in any appropriate manner, for example, by describing the type of equipment to be used. This method of definition, frequently employed in motor carrier as well as water carrier certificates, has been expressly approved by this Court. *Crescent Express Lines Inc.* v. *United States*, 320 U. S. 401, 408–410.

Applicant places considerable reliance upon a dictum of this Court in *United States* v. *Seatrain Lines*, 329 U. S. 424, 431. This dictum, it should be stressed, does not declare that the Commission is barred from specifying the kind of service which a carrier may perform. The Court's statement was to the effect that the Commission's power, in issuing an original water carrier certificate, to limit the type of service to be rendered is not "free from doubt" (p. 431).

There should be noted, at the outset, certain basic differences between the *Seatrain* case and

the instant case. In *Seatrain*, the Court found that the original certificate issued to the carrier was in conformity with the operations performed during the "grandfather" period, and that the subsequent amendment of the certificate, promulgated over Seatrain's vigorous and timely objections, constituted a drastic limitation tantamount to an unauthorized revocation (pp. 429–33). It was also noted by the Court (p. 428) that the district court had found that Seatrain had expended large sums in reliance upon the original certificate.

In the instant case, Hutton's original certificate was amended in 1944 so that Hutton would not be free to extend his operations "and perform services different from those performed by him on and since the statutory date" (R. 62). As Judge Clark emphasized (*ibid.*), in any event Hutton accepted the new certificate without question or formal objection. The appellant, moreover, did not come into the picture until 1947, when it applied for transfer of the certificate then outstanding in Hutton's name. In the transfer proceeding, it made no objection whatever to the language incorporated by virtue of the earlier amendment. Accordingly, as we shall point out more fully under Point II A, *infra*, appellant's authority, unlike Seatrain's, has been nowise altered, amended, or revoked. Appellant got precisely what it applied for and was on full

notice as to what it was getting at the time of the transfer.

Moreover, we respectfully suggest that this Court's expression of doubt in the *Seatrain* opinion was not meant to have the sweeping significance which appellant would attribute to it. The Court stated, it is true, that the Commission's power to limit a water carrier to a certain type of service was open to question. But the Court then had before it a case in which the Commission had first conferred authority to transport commodities generally (see 329 U. S. at 426) and later amended the certificate in a manner which the Court concluded (p. 427) deprived the carrier of that right. It is against this background that the statement must be read. One can scarcely believe, however, that the Court's comment means that there was no initial power to restrict Seatrain to the movement of commodities generally. Can it be seriously suggested, for example, that Seatrain is now free, notwithstanding the fact that its certificate authorizes only the carriage of general commodities, to assert the right to haul passengers as well as freight?

Water carrier certificates invariably carry limitations other than merely geographical ones.[11] In the *Seatrain* case, the original certificate, which

[11] See discussion of certificates relating to freighting and towing operations, *infra*, pp. 35–39.

was restored to full potency when the Court struck down the attempted amendment, limited the carrier to transporting commodities with the use of self-propelled vessels. In *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, the appellee company challenged the Commission's action in certificating a competitor. The challenged certificate was narrowly confined to operations as a "common carrier in the transportation by water of motor vehicles" (p. 237). The Court's unanimous opinion, holding that the Commission's grant of authority to perform such service was supported by the evidence and findings, contains no intimation whatever that the limitation to the carriage of motor vehicles was in any sense improper. In *Warner* v. *United States*, 97 F. Supp. 580 (W. D. Tenn.), affirmed, 341 U. S. 907, the Commission had confined the appellant carrier to particular services and commodities. The district court sustained the Commission's order against the carrier's contention that the evidence required a broader grant of authority, and this Court summarily affirmed. In *Cornell Steamboat* v. *United States*, 321 U. S. 634, 637, the Court declared:

> Cornell is in active competition with *other types* of interstate water carriers as well as with trucks and railroads. Therefore, if *Cornell's particular method of providing water transportation facilities* for others is not subject to regulation under

> the Act, it would appear to present an anomalous exception to the Congressional plan for regulation of competing transportation activities. We conclude that the language of the Act brings Cornell's business within its coverage, and that to construe the Act otherwise would frustrate the purpose of Congress. [Emphasis added.]

Concededly, these cases do not explicitly discuss the Commission's power to define the character of service to be provided by the authorized carrier. Yet, it seems plain that they recognize it. Thus, the long-settled practice of the Commission, implicitly confirmed by the course of judicial decisions, supports the conclusion to which the statutory provisions point.

As already indicated, important practical considerations likewise support the Commission's construction of the Act. The purpose of Congress in requiring water carriers to obtain certificates of public convenience and necessity was to enable the Commission to strike a balance between the public need for water transportation and the elimination of destructive competition among water carriers and between water carriers and other forms of transportation. If the Commission, in issuing a water carrier certificate, cannot define and limit the service to be performed, it will be placed in an absurd dilemma. An applicant for a certificate may desire only to perform a freightage service, for example, and may dem-

onstrate that the public convenience and necessity requires additional freightage service on the particular waterway. Under the Commission's present practice, such a showing would warrant the grant to a qualified applicant of a certificate of public convenience and necessity limited to freightage, as in the instant case.

On the other hand, if the Commission may only issue a certificate unlimited as to the type of service to be performed, then the issues of the certificate proceeding will be broadened greatly. The Commission must consider in relation to public convenience and necessity and competitive consequences not only the precise service which the applicant presently desires to perform but also the other types of water carrier service in which he might later choose to engage under a certificate unrestricted as to type of service. As a result, the Commission may find it necessary to insist upon a far broader showing as to the need for additional service and the effect upon competition. Similarly, all existing common carriers on the particular water route, regardless of the type of service which they perform, will see a potential competitor in every applicant for a certificate, even though the latter actually desires to provide only a single type of water transportation. In brief, the result sought by appellant would place an unnecessary burden and expense upon every applicant for a new certificate by complicating and lengthening certificate proceedings.

It cannot be assumed lightly that Congress intended to place such a burden upon those who seek to become common carriers by water, and at the same time to require that every carrier with "grandfather" rights be issued a certificate permitting it to perform every type of common carriage without regard to its actual and historic position in the industry. Such a result, moreover, would go far in defeating the purpose of the certificate system in maintaining a system of water transportation balanced between the public need for adequate transportation and the protection of the carriers from ruinous competition.

Moreover, if "grandfather" certificates must be unlimited as to type of service, the transfer, pursuant to Section 312, of such an unlimited certificate from a small operator, such as Hutton, who has performed only a single type of service, to a carrier with larger resources and a desire to engage in wider operations, would completely alter the competitive conditions on a waterway.

In view of these practical considerations, it is not surprising that Congress, which has been fully informed concerning the Commission's policy, has acquiesced in it. In its annual report for the year ending October 31, 1942, the Commission advised Congress that:

> Because of the special nature of the services performed by different types of water carriers, division 4 found that proper administration required that it exercise the

> power under section 304 (c) to classify such carriers. The certificates and permits issued have limited the carrier to transportation by (1) self-propelled vessels, (2) sailing vessels, (3) non-self-propelled vessels with the use of separate towing vessels (barge-line services), (4) towing vessels, or (5) vessels furnished to persons other than carriers for use by such persons in the transportation of their own property (restricted to contract carriers by statutory definition in section 302 (e)). In some instances, a carrier has been authorized to perform more than one type of transportation.[12]

Again in 1944, the Board of Investigation and Research, created under Part I of Title III of the Transportation Act of 1940, in its report entitled *Federal Regulatory Restrictions Upon Motor and Water Carriers*, informed Congress that:

> In granting certificates and permits to water carriers under the "grandfather" clauses, the Commission restricts carriers to the type or types of equipment which they were operating on the "grandfather" date and up to the time it acted upon each application. As a result, each operating authorization limits a carrier to the use of self-propelled vessels or non-self-propelled vessels or towing vessels or sailing ships, or a combination of these different types of

[12] 56th Annual Report of the Interstate Commerce Commission, p. 141.

equipment. Division 4 justified this type of restriction on the following grounds:

"Applicant furnishes transportation by barge, and we will limit his service to that type of operation. Classification of carriers in terms of their type of operation assures the public that the same type of service will be continued by them. In this manner the competitive balance of types of carriers over the same route will not be disrupted by changes which they might make without first securing from this Commission the necessary certificates of public convenience and necessity. We will, therefore, as a general policy employ such a classification in defining the operating rights of water carriers subject to part III of the act."*

It is clear from this statement that the policy of restricting water carriers to particular types of equipment was adopted primarily as a means to control competition among water carriers operating different kinds of water-carrier equipment. It prevents operators of one type of equipment from engaging in transportation by means of another type of equipment without first obtaining permission from the Commission.[13]

* *A. L. Mechling Barge Line Common Carrier Application*, 250 I. C. C. 77, 78 (1941). See I. C. C. Annual Report, 1942, p. 141, for a statement on this policy.

[13] S. Doc. 78, 79th Cong., 1st Sess. (1945), pp. 264–265.

Similar information had already been furnished to Congress in a summary of this report.[14]

We submit that the Commission's interpretation of the Act in the only way which permits practical administration of the certificate system, and which has been unchallenged by the affected industry or by Congress for 11 years, should prevail over the mechanical comparison of Titles II and III of the Act which is the petitioner's sole reliance.

II

APPELLANT'S CERTIFICATE AUTHORIZES IT TO PERFORM ONLY A FREIGHTING SERVICE

A. APPELLANT'S RIGHTS ARE TO BE DETERMINED SOLELY ON THE BASIS OF THE LANGUAGE OF THE AMENDED CERTIFICATE

Appellant, seeking to escape the effect of the words of limitation contained in Hutton's certificate at the time of the transfer (1947), rests heavily on the proposition that the Commission's action in amending Hutton's certificate in 1944 was unauthorized (Br., Point I). To this, there are two answers. In the first place, we do not believe that the Commission's action in 1944 was unauthorized. But, secondly, even if the Commission's action were deemed unauthorized, appellant would be no better off. Hutton failed to challenge the amendment and could not have done so in 1947, the date when appellant first entered

[14] H. Doc. 637, 78th Cong., 2d Sess., p. 19. The summary of the report was published to the industry in 11 I. C. C. Prac. J. 818, 837 (June, 1944).

the picture. Obviously, appellant, which applied for transfer of the specific rights set forth in the outstanding certificate, stands in no better position than its predecessor. And it may not attack collaterally the certificate upon which its authority rests.

1. Hutton's original application was filed in 1941. The report of Division 4 (R. 7) did not find that the applicant had been engaged in moving shippers' scows, *i. e.*, in the service of towage. It found, on the contrary, that Hutton's operations had been performed as a common carrier of commodities (R. 8), rather than as a towor, and that Hutton had utilized his flotilla as a unit, *i. e.*, to perform a complete transportation service (freightage).[15] The certificate which Division 4 issued incorporated the report and ordered that the applicant be authorized to continue such operations, "subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission" (R. 10).

In 1944, the Commission, on its own motion, ordered the Hutton application opened for reconsideration, and filed a report and amended certificate and order (R. 11–14). It pointed out that in its prior report it had failed to specify "the type of vessels to be used by applicant in the exercise of the authority granted" (R. 11).

[15] The distinction between "towage" and "freightage" is discussed, *infra*, pp. 35–36.

It described, as it had in the first report, the operations in which Hutton had been engaged on and since January 1, 1940 (R. 12). Stating that the failure of specification would leave Hutton "free to extend * * * operations and perform services different from those performed by him on and since the statutory date," Division 4 concluded that the certificate should be amended to permit

> * * * operation as a common carrier by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels, in interstate or foreign commerce, in the transportation of commodities generally between points in the area defined in our order of March 26, 1941 * * * [*ibid.*]

These words, as we shall point out under Point II B, are words of art which have a well-established meaning, a meaning which had been set forth in Commission reports and was well known to the industry at the time the amendment was effectuated; their effect is to limit a carrier to a freighting service.

There is no suggestion in this record and no contention made that the reports of Division 4 (R. 7, 11) inaccurately describe Hutton's operations. Unlike the situation in the *Seatrain* case, the amendment of the Hutton certificate left Hutton free to continue the operations in which

he had been theretofore engaged. The amendment was simply designed, in Judge Clark's words (R. 65), "to correct a certificate having the obvious legal ambiguity of the first Hutton certificate which, although in form general, was nevertheless expressly based on a finding of more limited grandfather rights." Cf. *Riss & Co., Inc.* v. *United States*, 100 F. Supp. 468, 474 (W. D. Mo.), affirmed, 342 U. S. 937, rehearing denied, 343 U. S. 937. The act of amendment, in these circumstances, was, we submit, an appropriate exercise of the power conferred by Section 309 (d) to attach to a certificate "such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require * * *."

2. But even were one to assume, for purposes of argument, that the amendment could have been successfully challenged by timely action on Hutton's part, the fact remains that it was not challenged, and no challenge, direct or collateral, can now be asserted by Hutton's successor.

"Hutton accepted the new certificate apparently without any question and certainly without any formal objection, either within the time permitted or otherwise" (R. 62). It is to be noted that the 1944 order issuing the amended certificate was promulgated by Division 4 (R. 13–14), and that an order of a division is reviewable only if an affected party has presented to the Commission, and the Commission has denied, a petition

for reconsideration (Sections 17 (9), 316 (a)). When Hutton failed to present a petition within the permissible time,[16] the order, as to him, became final and unchallengeable. See *United States* v. *L. A. Tucker Lines, Inc.*, 344 U. S. 33; *Holmes* v. *United States*, 89 F. Supp. 894 (S. D. N. Y.), affirmed, 339 U. S. 927. Certainly, appellant, coming into the picture in 1947 as Hutton's transferee, stands in no better position than its predecessor in interest. *Gregg Cartage & Storage Co.* v. *United States*, 316 U. S. 74; *Interstate Commerce Commission* v. *Moland Bros. Trucking Co.*, 62 F. Supp. 921, 923–4 (D. Minn.).[17]

It is also plain that appellant may not, in the guise of seeking an interpretation of the transferred authority, launch a collateral attack upon the certificate and do indirectly what it is precluded from doing directly.[18] It is to be emphasized, in this connection, that appellant sought to purchase the rights covered by the "amended cer-

[16] Except for good cause shown and upon leave granted, a petition to reconsider action taken on an application must be filed within thirty (30) days. *General Rules of Practice Before The Interstate Commerce Commission* (1942), Rule 101 (e); 49 C. F. R. 1.101 (e).

[17] Note, also, that where a certificate changes hands by virtue of a transfer or the acquisition of one carrier by another, the Commission is authorized to attach appropriate conditions. Section 312. And see *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419.

[18] By a separate petition filed July 20, 1951 (Tr., Ex. 7), appellant requested the Commission to issue it a new certificate in the terms of Hutton's original certificate. Appellant has not sought judicial review of the Commission's order of July 7, 1952 (*ibid.*), denying this petition.

tificate dated March 7, 1944" (R. 15). As the report of the Commission on the transfer application makes plain (R. 15–21), appellant made no objection whatever to the language describing the scope of operating authority. Indeed, when an intervening competitor urged that the 1944 certificate which appellant sought was too broad, on the ground that Hutton had abandoned certain operations between 1941 and 1944, counsel for appellant insisted that the terms of the 1944 certificate were no longer subject to challenge. This is reflected in the report on the transfer application in which it is stated (R. 20):

> Counsel for the [transfer] applicants points out that the certificate may not be attacked collaterally in this proceeding, and contends that when a certificate is finally granted, and the time for rehearing has expired, the certificate is not subject to revocation in whole or in part, citing *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424.

A fortiori, the terms of the 1944 certificate were not challengeable in 1951, when appellant, for the first time, suggested that there was a defect.[19]

[19] It is to be noted that appellant's petition, which instituted this proceeding, did not question the Commission's power to specify the nature of service to be performed by a water carrier. At that time, appellant sought only a determination as to the type of service covered by the language of its certificate. It was not until later in the proceeding, *i. e.*, subsequent to the filing of the examiner's report, that appellant, for the first time, questioned the Commission's authority. See Exceptions to Examiner's Report, filed June 18, 1951 (Tr., Ex. 7).

Appellant, having sought to purchase the authority set forth in the amended certificate, and having acquired that authority and obtained benefits thereunder, will not now be heard to say that words of limitation appearing in that certificate are to be ignored. *Alabama Power Co. v. Federal Power Commission*, 128 F. 2d 280, 293 (C. A. D. C.), certiorari denied, 317 U. S. 652; *Central Nebraska Pub. P. & I. Dist. v. Federal Power Commission*, 160 F. 2d 782, 784 (C. A. 8), certiorari denied, 332 U. S. 765.

B. THE WORDS IN APPELLANT'S CERTIFICATE DEFINING ITS OPERATING AUTHORITY ARE WORDS OF ART AUTHORIZING ONLY FREIGHTAGE, AND NOT TOWAGE

Appellant's certificate authorizes it to operate as a common carrier "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels." We submit that this language does not authorize appellant to conduct general towing operations, as it seeks to do (*infra*, pp. 42–43), but restricts it to the service commonly known as freightage.

The distinction between freightage and towage is well known in maritime law, and has been consistently recognized by the Commission in its administration of Part III of the Interstate Commerce Act. Freightage connotes the furnishing of the complete transportation service. The

carrier has full control over the vessels,[20] handles their loading and unloading, and assumes responsibility for the goods while in transit. Towage, on the other hand, is merely the "supplying of power by a vessel * * * to tow or draw another * * *," *Stevens* v. *The White City*, 285 U. S. 195, 200; cf. *Sacramento Navigation Company* v. *Salz*, 273 U. S. 326, 328.

In issuing certificates under the "grandfather" clause, the Commission has treated freightage and towage as distinct types of service or fields of operation, *Eastern Transportation Company Contract Carrier Application*, 250 I. C. C. 505, 508 (1942), and has specified whether the carrier was authorized to perform one or the other, or both. Where freightage was authorized, the certificate has used the words "by non-self-propelled vessels with the use of separate towing vessels."[21] Where towage authority was granted, the certificate has specified "by towing vessels [or tugboats] in the performance of general tow-

[20] The carrier itself usually furnishes the vessels, which it may own or lease. In some instances, however, the carrier may use the shipper's barges. *Cf. Campbell Transportation Company Common Carrier Application*, 260 I. C. C. 107, 110 (1943).

[21] *United Boat Lines Common Carrier Application*, 250 I. C. C. 81 (1941); *Choctaw Transportation Co. Contract Carrier Application*, 250 I. C. C. 106 (1941); *McLain Marine Corporation Common Carrier Application*, 250 I. C. C. 297 (1942); *McLain Carolina Line, Inc., Common Carrier Application*, 250 I. C. C. 327 (1942); *John J. Mulqueen Contract Carrier Application*, 250 I. C. C. 436 (1942).

age."[22] And, where the carrier's "grandfather" operations were found to cover both towage and freightage, the certificate has used both phrases, *i. e.*, "by non-self-propelled vessels with the use of separate towing vessels * * * *and* by towing vessels in the performance of general towage." [Emphasis added.][23] On December 14, 1943—almost three months before Hutton received his amended certificate—the Commission explicitly declared that this long-recognized distinction compelled the conclusion that "Authority to perform * * * towage is not included in the authority granted to water carriers to engage in the transportation of commodities by non-self-propelled

[22] *J. D. Orrell Contract Carrier Application*, 250 I. C. C. 67 (1941) ("by tugboats"); *John L. Goss Corp. Contract Carrier Application*, 250 I. C. C. 101 (1941) ("by tugboats"); *Moran Towing & Transportation Co., Inc., Applications*, 250 I. C. C. 541 (1942) ("by towing vessels").

[23] *James McWilliams Blue Line Inc. Common Carrier Application*, 260 I. C. C. 15 (June 24, 1943); *Tidewater Transp. Co. Common Carrier Application*, 260 I. C. C. 30, 31 (July 23, 1943), affirmed *sub nom. Inland Nav. Co.* v. *United States*, 76 F. Supp. 567 (E. D. Wash.); *Upper Mississippi Towing Corp. Common Carrier Applications*, 260 I. C. C. 85 (Sept. 15, 1943); *Campbell Transportation Company Common Carrier Application*, 260 I. C. C. 107 (1943); *Southern Transportation Co. Contract Carrier Application*, 260 I. C. C. 129 (1944); *Colle Towing Company Applications*, 260 I. C. C. 681 (1946); *Merene Company Applications*, 260 I. C. C. 689 (1946); *Cumberland River Sand Company Common Carrier Application*, 260 I. C. C. 734 (1946); *Baton Rouge Coal and Towing Co., Contract Carrier Application*, 260 I. C. C. 761 (1946); *American Barge Line Company Applications*, 260 I. C. C. 783 (1946).

vessels with the use of separate towing vessels." *Campbell Transportation Company Common Carrier Application, supra.*[24] That decision in the *Campbell* case was referred to by the Commission in several subsequent cases in which towage authority was specifically granted. *Central Barge Co. Applications*, 260 I. C. C. 329, 339 (1944); *Terrebonne Towing Company, Inc., Exemption*, 260 I. C. C. 551, 554 (1945); *Union Barge Line Corporation Applications*, 260 I. C. C. 563, 564 (1945).

Thus, the clear and consistent course of Commission practice has been to use the words "non-self-propelled vessels with the use of separate towing vessels" in a certificate as words of art granting authority to engage only in freightage. Long before appellant acquired Hutton's amended certificate in 1948, these words had acquired this

[24] Appellant argues that the *Campbell* case incorporated a new policy and overruled the Commission's earlier decision in *Eastern Transportation Company Contract Carrier Application*, 250 I. C. C. 505 (Br. 14–15, 18, 21, 43–44). The Commission's first decision in the *Eastern* case, on October 19, 1942, did not include a grant of authority to tow shippers' barges. Its report on reconsideration, on March 6, 1943, modified its prior decision and granted Eastern a new certificate specifically authorizing it to perform both freightage and towage (250 I. C. C. 635). Between the *Eastern* case on rehearing and the *Campbell* case there were at least three other cases in which the Commission issued certificates specifically authorizing both towage and freightage (see *supra*, note 24). Thus, the *Campbell* case enunciated no new policy, but followed the Commission's then well-settled practice of specifying both towage and freightage where the carrier was authorized to perform both services.

precise meaning in the trade.[25] Indeed, even prior to the issuance of Hutton's amended certificate in 1944, the Commission had stressed in the *Campbell* case, *supra*, that certificate authority to engage in transporation by non-self-propelled vessels with separate towing vessels did not authorize towage.

This consistent construction of its certificates by the Commission is, we submit, entitled to great weight. *United Truck Lines* v. *Interstate Commerce Commission*, 189 F. 2d 816, 817 (C. A. 9), certiorari denied, 342 U. S. 830; *Adirondack Transit Lines* v. *United States*, 59 F. Supp. 503, 504 (S. D. N. Y.), affirmed, 324 U. S. 824; *cf. United States* v. *American Trucking Associations*, 310 U. S. 534, 549.

Appellant argues that by construing its certificate not to authorize towage the Commission is "reading into that certificate a classification [of water carriers] which is not referred to therein" (Br. 28). The short answer to this contention is that the very language of the certificate itself describes the service to be rendered, i. e., freightage, and limits appellant to such service.[26]

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[25] Appellant's authority to operate as a common carrier by "self propelled vessels" obviously does not authorize it to tow other vessels.

[26] The Commission's decision in *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M. C. C. 289, affirmed *sub nom. Coastal Tank Lines, Inc.* v. *United States*, — F. Supp. — (D. D. C. No. 2271–50, Feb. 10, 1953), which appellant cites in support of this contention, is not in point. In that

Equally without merit is appellant's contention that, by construing its certificate as limiting it to freightage, the Commission has modified or revoked Section 314 of the Interstate Commerce Act (Br. 40–47). That Section authorizes a carrier to make reasonable allowances to shippers who furnish a portion of the services or facilities involved in the transportation rendered. The invalidity of appellant's allowances, however, stems not from any unreasonableness as to amount, but from the fact that they were made in connection with a transportation service which appellant is not authorized to perform. As Judge Clark stated, Section 314 "obviously deals with lawful transportation; it does not override earlier sections to make that lawful which is unlawful" (R. 70). Appellant fully retains its rights to make proper allowances to shippers as long as it stays within its operating authority.[27]

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case the Commission held that a motor carrier's certificate to transport general commodities did not preclude it from transporting bulk petroleum products in tank cars, even though the Commission previously had classified the latter as a distinct type of service. The rationale of the decision was that general commodities encompassed petroleum products. In the instant case, however, appellant does not have authority to engage in general river transportation, but is limited by the terms of its certificate to freightage.

[27] Appellant's argument that the Commission's findings fail to meet the requirements of Section 8 (b) of the Administrative Procedure Act, 60 Stat. 242, 5 U. S. C. 1007, appears, as the court below noted, "to border on the frivolous" (R. 70). The Commission's report (R. 23–32) fully considers and rules upon all of the "material issues" tendered by ap-

In issuing Hutton's amended certificate, the mission found that on and since January 1, 1940, Hutton had been in operation "as a common carrier * * * by non-self-propelled vessels with the use of separate towing vessels (R. 12). Hutton's amended certificate used the identical language in specifying the service to be rendered (R. 13). Since the Commission's report in the original "grandfather" proceedings showed that Hutton had been performing a freighting service,[28] and since the Act contemplated that "grandfather" certificate authority was to be restricted to the service previously rendered, we submit that the Commission clearly intended to and did limit Hutton to a freightage service when it used the words "by non-self-propelled vessels with the use of separate towing vessels" in the amended certificate. Appellant, as Hutton's successor in interest, possesses no greater rights (see *supra*, pp. 32–35).

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pellant. The Commission specifically rejected appellant's contention that the allowances were invalid under Section 314, finding that in so far as they covered towage they were "published without authority" and consequently "unlawful" (R. 32). See *Emery Transportation Co.* v. *United States*, 91 F. Supp. 644, 646 (S. D. Ohio), affirmed, 339 U. S. 955.

[28] The Commission found that Hutton owned and managed one steam power boat and four barges, "all of which are operated as a unit;" and that on occasion he had rented or chartered other barges "for operation in applicant's fleet" (R. 7).

III

THE SERVICE PERFORMED BY APPELLANT IN CONNECTION WITH THE MOVEMENT OF FREIGHT IN SHIPPERS' SCOWS CONSTITUTES TOWAGE AND NOT FREIGHTAGE

We have previously pointed out that freightage involves the provision of the complete transportation service, whereas towage consists of supplying the motive power by which shippers' vessels are moved (supra, pp. 35–36). A carrier engaged in freightage may employ shippers' scows provided they are used as a part of its equipment. *Campbell Transportation Company Common Carrier Application*, 260 I. C. C. 107, 110; *Dixie Carriers, Inc., Rates and Allowances*, 278 I. C. C. 417, 423–424. But if the scows are received as part of the consignment to be towed, the carrier is rendering a towage service. *Ibid.* In the instant case the Commission found that appellant used shippers' scows under circumstances which "inescapabl[y]" showed that they were not a part of its own equipment (R. 32). This finding is fully supported by the record.

The allowances in the instant case are made to shippers who furnish scows for downstream transportation of bricks on the Hudson river (R. 28, 29). The scows are provided with a captain who is responsible to the shipper or scow owner, and is paid by him (R. 28). No bills of lading or shipping orders are issued covering the

goods carried in the scows (R. 31). Appellant may not transport the property of other shippers in the scows (*ibid.*), and is required to return the scows empty to the shipper upon completion of the downstream transportation (R. 29, 32). If appellant does not do so, he makes a further allowance (R. 29). Appellant's free time and demurrage rules are inapplicable when the shippers furnish the scows (R. 29, 32).[29] As the court below held, these facts "permit of no other" finding than that appellant receives the scows "as part of a consignment to be towed" and that it does not use them as "a part of its equipment" (R. 64). The Commission was plainly correct in finding that "the transportation performed by the petitioner [appellant] in connection with the movement of freight in shippers' scows constitutes a towage service" (R. 32).

[29] A water carrier who furnishes the complete transportation service is required to give shippers a reasonable period of free time (*i. e.*, without demurrage charges) to deliver and remove cargo from the loading area. *The Eddy*, 5 Wall. 481, 495.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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APPENDIX

Part I of the Interstate Commerce Act, 24 Stat. 739 as amended, 49 U. S. C. 1 *et seq.*, provides, in pertinent part as follows:

> Section 17 (9):
>
> When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Part III of the Interstate Commerce Act, 54 Stat. 929, 49 U. S. C. 901 *et seq.*, provides in pertinent part as follows:

> Section 304 (c):
>
> The Commission may establish from time to time such just and reasonable classifications of groups of carriers included in the terms "common carrier by water", or "contract carrier by water", as the special nature of the services performed by such carriers shall require; and such just and reasonable rules, regulations, and require-

ments consistent with the provisions of this part to be observed by the carriers so classified or grouped, as the Commission, after hearing, finds necessary or desirable in the public interest.

* * * * *

Section 309 (a):

Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. * * *

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Section 309 (d):

Such certificate shall specify the route

or route over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

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Section 312:

Except as provided in this Part, any such certificate or permit may be transferred in accordance with such regulations as the Commission shall prescribe for the protection of the public interest and to insure compliance with the provisions of this part.

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Section 314:

If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

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Section 316 (a):

The provisions of * * * section 17 of part I * * * shall apply with full force and effect in the administration and enforcement of this part.